Supreme Court, U.S.
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NO. 92-1121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

FREDERICK M. DEVER, JR.,
PETITIONER,

vs.

THE STATE OF OHIO,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

(1) DOES THE CONFRONTATION CLAUSE PROHIBIT THE ADMISSION OF HEARSAY FALLING WITHIN THE FIRMLY ROOTED "MEDICAL DIAGNOSIS AND TREATMENT" EXCEPTION TO THE HEARSAY RULE IN A CRIMINAL CASE?

(2) DOES A STATE SUPREME COURT, IN REVIEWING A CONVICTION IN A CRIMINAL CASE FOLLOWING A REMAND BY THE UNITED STATES SUPREME COURT FOR RECONSIDERATION IN LIGHT OF RECENT CASES DECIDED BY THE UNITED STATES SUPREME COURT ERR, IN CONSIDERING THOSE CASES?

(3) DOES A DUE PROCESS VIOLATION OCCUR WHEN A STATE SUPREME COURT INTERPRETS STATE RULES OF EVIDENCE AND AFFIRMS THE INTERPRETATION GIVEN THEM AT THE TRIAL LEVEL?

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OPINIONS BELOW

The opinion of the Ohio Supreme Court reviewing the decision of the Court of Appeals, First Appellate District and reinstating the judgment of conviction of the Court of Common Pleas is reported at *State* v. *Dever*, 64 Ohio St.3d 401, 596 N.E.2d 436 (1992), and is set out as Appendix B of the petition.

The judgment of conviction of the Court of Common Pleas, Hamilton County, Ohio (1988) is unreported and is set out as Appendix A to this brief. The first Opinion of the First District Court of Appeals, Hamilton County, Ohio (1990), affirming that conviction is unreported and set out as Appendix G to the petition.

This court's decision in granting a writ of certiorari and remanding the case to the First District Court of Appeals,

Hamilton County, Ohio, is reported at *Dever* v. *Ohio*, 111 S.Ct. 575, 112 L.Ed.2d 581 (1990). (Appendix D to the petition)

The decision of the First District Court of Appeals, Hamilton County, Ohio (1991), following the remand is unreported and set out as Appendix C to the petition.

JURISDICTION

This Court has jurisdiction to review the constitutional claims made under 28 U.S.C. 1257. This court does not have authority to determine and interpret the Ohio Rules of Evidence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment, Section 1, to the Constitution of the United States.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or im-

munities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OHIO RULES OF EVIDENCE

Evidence Rule 102:

"**Purpose and construction**

The purpose of these rules is to provide procedures for the adjudication of causes to the end that the truth may be ascertained and proceedings justly determined. These rules shall be construed to state the common law of Ohio unless the rule clearly indicates that a change is intended and shall not supersede substantive statutory provisions."

Evidence Rule 803:

"**Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

FEDERAL RULES OF EVIDENCE

Evidence Rule 102:

"**Purpose and construction.**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

Evidence Rule 803:

"**Hearsay Exceptions; Availability of Declarant Immaterial.**

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(4) Statements for purposes of medical diagnosis or treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

STATEMENT OF THE CASE

On October 21, 1987, Diane Potter lived on the second floor at 6947 Cambridge Drive in Mariemont, Hamilton County, Ohio. (T.p. 168, 235) The Dever family lived on the first floor. (T.p. 168, 169) The construction of the building was such that sounds from the first floor bathroom traveled to the second floor bathroom. (T.p. 169, 170)

Shortly after ten o'clock, Ms. Potter prepared to take a shower and could clearly hear voices from the first floor bathroom. (T.p. 169, 177) Ms. Potter heard Kristen Dever whining or crying and her step-father, defendant, saying "come on, come on, it will only take a minute." Kristen kept saying "no" and defendant kept saying "come on." Eventually, Kristen said "okay." (T.p. 171)

Following this, Ms. Potter heard defendant groaning loudly. (T.p. 172) Ms. Potter then described the exchange she heard as follows:

> "He groaned three times very loudly and that was what made me really start listening, I didn't turn on the water, I just listened and I heard him tell Kristen to count to 600 and I heard her counting and then he said oh, that feels so good and she said oh, does that feel good daddy, and he said yes and then he told her to keep counting and she stopped and he said come on, just count to 20, just count to 20 and she said no, I don't want to. I could hear mumbling and then I heard her say oh, daddy, you got it all over my hand and he said yes, I got it all over you, didn't I." (T.p. 172)

Upon hearing this, Ms. Potter called police. (T.p. 172)

Mariemont Police Officer Mike Wilson initially received the call at 11:00 p.m. and asked Ms. Potter to come to the police station to make a report. (T.p. 233, 234) Officer Wilson, after consulting an assistant prosecuting attorney,

located and consulted Kristen's mother, Charlene Dever. (T.p. 235, 236) Police Officer Wilson carefully laid out the circumstances leading to the statement. He was careful to have Charlene Dever remove the victim from her home without a confrontation. (T.p. 251) The second day following Ms. Potter's 11:08 p.m. report to police, Officer Wilson met with Kristen Dever and Charlene Dever. (T.p. 261) The three went to the County Welfare Department. He was careful not to characterize the type of sexual activity he suspected. Only the Diane Potter statement was supplied. (T.p. 258) During the time going to the Welfare Department and Children's Hospital, Kristen did not discuss the offense with the police officer. (T.p. 262, 263) The officer did not indicate to anyone that there was an eye witness to the offense. (T.p. 261) From there, Officer Wilson, Kristen and her mother went to Children's Hospital.

Dr. Ann Saluke, M.D., conducted the examination. (T.p. 192, 193, 194) Dr. Saluke testified that part of the examination procedure is an interview with the child. (T.p. 194) The purpose of the questioning is to get some indication of possible physical injuries, to determine the extent of contact, the possibility of sexually transmitted diseases, the risk of repeated exposure, and the risk of psychological damage. (T.p. 194 to 200) The doctor further testified that the identity of the offender is necessary for proper diagnosis and treatment for the reasons stated above. (T.p. 195, 200)

The interview with Kristen began about 4:30 p.m. with the doctor, social worker, and Kristen's mother present. (T.p. 201, 202) Kristen would not answer any questions on the subject of the abuse as long as her mother was present. (T.p. 202) Instead, Kristen would simply jump from subject to subject. (T.p. 202) Kristen's mother was teary-eyed, stated Kristen had trouble talking in front of her on the subject, and said it would be better if she left the room. (T.p. 203)

After Kristen's mother left, Kristen told Dr. Saluke that her father, the defendant, put his "pee pee" in her mouth and

there was white stuff with a "yucky taste." (T.p. 209, 210) Kristen described the taste further and indicated that "pee pee" indicated genitalia. During the episode, Kristen said defendant touched her "pee pee." (T.p. 210)

On November 25, 1987, the Grand Jury of Hamilton County, Ohio returned indictment B-875350 charging defendant with Rape and Gross Sexual Imposition. Defendant entered a not guilty plea and retained counsel on December 4, 1988.

The Court of Common Pleas, Hamilton County, Ohio, found the victim, defendant's four year old step-daughter, could not testify on April 5, 1988. On August 29, 1988, a jury was impaneled and trial began. On September 1, 1988, the jury returned its verdict finding defendant guilty as charged.

The Court of Common Pleas, Hamilton County, Ohio, imposed a sentence on October 12, 1988, of 10 to 25 years plus costs. Five years of the minimum was ordered to be actual incarceration.

On November 10, 1988, a notice of appeal was filed to the First District Court of Appeals, Hamilton County, Ohio. That court cited coroborating evidence to justify the admission of the out of court statement. The judgment was affirmed on January 31, 1990.

The Ohio Supreme Court declined to hear the case on June 13, 1990.

The United States Supreme Court on December 10, 1990, granted certiorari and vacated the judgment of the First District Court of Appeals, Hamilton County, Ohio, for further consideration in light of *Idaho* v. *Wright*, 497 U.S. ____, 110 S.Ct. 3139 (1990).

On the remand, the First District Court of Appeals, Hamilton County, Ohio, reversed the judgment of the Court of Common Pleas. An appeal was then taken by the State of Ohio to the Supreme Court of Ohio. That court reinstated the judgment of the Court of Common Pleas.

REASONS FOR DENYING THE WRIT

I

THE "CONFRONTATION CLAUSE" DOES NOT PROHIBIT THE ADMISSION OF HEARSAY WHICH FALLS WITHIN THE FIRMLY ROOTED "MEDICAL DIAGNOSIS AND TREATMENT" EXCEPTION TO THE HEARSAY RULE IN A CRIMINAL CASE.

ARGUMENT

The pertinent fact which gives rise to the single issue which has been litigated in this case is that a child's statement to a treating medical doctor was admitted pursuant to Ohio Evidence Rule 803(4). The trial court relied upon *United States* v. *Renville*, 779 F.2d 430 (C.A., 1985), in determining to admit the child's statement to the medical doctor.

The foundation for the admission of this evidence included the fact that the child was not coached. The report did not come from the highly charged atmosphere of a domestic dispute. The doctor made certain the child was not frightened during her examination. The physician explained to the child the necessity of determining what had happened to her in terms of finding bugs and helping the person who touched her. The child insisted upon talking to the medical doctor. The child refused to talk about the subject in the presence of her mother. The medical doctor testified that immediately after the mother left the room the child described what happened in detail which goes beyond the ordinary knowledge of a four year old. She stated:

> "A. Kristen told us that her father put his pee pee in her mouth and there was some white stuff that had a yucky taste and also that he put his hands on her pee pee and his pee pee on her pee pee and she identified her genital area as the pee pee.

> Q. Did she identify what she meant by father's pee pee?
>
> A. The same area.
>
> Q. Okay, now did she describe that taste any further beside yucky taste?
>
> A. She described it as mashed potatoes with butter." (T.p. 209, 210)

The Court of Common Pleas found that this fell within Ohio Evidence Rule 803(4). The Ohio Supreme Court affirmed and found no confrontation clause violation holding in syllabus (3):

> "3. The admission into evidence of a hearsay statement pursuant to a firmly rooted hearsay exception does not violate a defendant's right of confrontation. (**White v. Illinois** [1992], 502 U.S. ____, 112 S.Ct. 736, 116 L.Ed.2d 848, followed.)"

The issue before this court is whether the Ohio Supreme Court properly applied **White v. Illinois**, 502 U.S. ____, 112 S.Ct. 736, (1992), and **Idaho v. Wright**, supra.

Idaho v. *Wright*, supra, was followed because the Ohio Supreme Court *did not* rely upon any corroboration of this statement to determine admissibility. Instead, a well rooted exception to the hearsay rule was used to admit the testimony. This Court in *Idaho* v. *Wright*, supra, held:

> "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements."

Thus, the Ohio Supreme Court followed the decision in *Idaho* v. *Wright*, supra.

The case of *White* v. *Illinois*, supra, is more directly on point.[1] At page 742 and 743 of the Supreme Court reporter this Court held:

> "We note first that the evidentiary rationale for permitting hearsay testimony regarding spontaneous declarations and statements made in the course of receiving medical care is that such out-of-court declarations are made in contexts that provide substantial guarantees of their trustworthiness.
>
> Similarly, a statement made in the course of procuring medical services, where the declarant knows that a false statement may cause misdiagnosis or mistreatment, carries special guarantees of credibility that a trier of fact may not think replicated by courtroom testimony.
>
> * * *
>
> We therefore see no basis in **Roberts** or **Inadi** for excluding from trial, under the aegis of the Confrontation Clause, evidence embraced within such exceptions to the hearsay rule as those for spontaneous declarations and statements made for medical treatment."

Thus, statements admitted under the hearsay exception for medical diagnosis and treatment do not violate the Confrontation Clause.

Petitioner claims, however, that the Ohio Supreme Court, in interpreting Ohio Evidence Rule 102, expanded the "medical diagnosis and treatment exception" to the hearsay rule beyond the "common law" exception. Ohio Evidence Rule 102 significantly differs from Federal Evidence Rule 102

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[1] *White* v. *Illinois*, supra, involved a 4 year-old as does this case. General claims about the knowledge and motivations of the out of court declarants in *White* v. *Illinois* and the case at bar are necessarily the same.

in that Ohio courts may not broadly construe the evidentiary rules. The discussion of this issue by the Ohio Supreme Court involved a modification and expansion of the prior Ohio Supreme Court cases of *Cleveland Ry Co.* v. *Merk*, 124 Ohio St. 596, 180 N.E. 51 (1932)[2] and *State* v. *Boston*, 46 Ohio St.3d 108, 545 N.E.2d 1220 (1989).[3] The net result was for the Ohio Supreme Court to bring its interpretation of Ohio Evidence Rule 803(4) into line with the identically worded Federal Evidence Rule 803(4).

It is submitted that this change did not break the hearsay exception used in this case from its firmly rooted moorings.

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[2] This 1932 case limited this Ohio hearsay exception to statements relevant to *treatment* only.

[3] *Boston* appeared to use corroboration in determining admissibility in violation of *Idaho* v. *Wright*, supra.

II

A STATE SUPREME COURT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BY APPLYING CASES DETERMINED BY THE UNITED STATES SUPREME COURT FOLLOWING A REMAND BY THAT COURT.

Next, petitioner argues that a violation of due process occurred because the state was not required to prove a "motivational factor" or "prove an indicia of reliability and guarantee of trustworthiness." This Court remanded the original *Dever* case to the Ohio courts for consideration of *Idaho* v. *Wright*, supra. Subsequent to the remand, *White* v. *Illinois*, supra, was decided. Both of those cases hold that proffered hearsay falling within a firmly rooted exception to the hearsay rule has sufficient guarantees of reliability for the Confrontation Clause. Once the Ohio Supreme Court found that the hearsay met a firmly rooted exception (medical diagnosis or treatment) it was unnecessary to make the further inquiries required by *Idaho* v. *Wright*, supra. Those are required when non-firmly rooted exceptions, such as the residual exception discussed in *Idaho* v. *Wright*, supra, are used.

Petitioner goes on to repeat his claim that the broadening of Ohio's Evidence Rule 803(4) to make its interpretation identical to Federal Evidence Rule 803(4) loosened it from its "firmly rooted" moorings. This claim is again baseless as in its opinion the Supreme Court of Ohio at page 412 stated:

> "Keeping in mind that the child's motivation is not the sole focus of the Evid. R. 803(4) inquiry, we find evidence of the child's motivation in the record, as revealed in Dr. Saluke's testimony.
>
> * * *
>
> But, as we have stated above, a court should not presume, as the court of appeals did, that the statements are unreliable merely because there is no

> indisputable evidence of the child's motivation. Rather, in a case such as this, when an examination of the surrounding circumstances casts little doubt on the motivation of the child, it is permissible to assume that the factors underlying Evid. R. 803(4) are present."

Thus, the Ohio Supreme Court did not eliminate a motivational requirement. Instead, it found that the motivational element is provided in Dr. Saluke's testimony.

III

NO DUE PROCESS VIOLATION OCCURS WHEN THE INTERPRETATION OF STATE EVIDENCE RULES BY A TRIAL COURT ARE AFFIRMED BY THE STATE SUPREME COURT.

Finally, petitioner claims that the interpretation given Ohio Evidence Rule 803(4) was an improper "retrospective" interpretation. Prior to the 1988 trial in this case Ohio Evidence Rule 803(4) had been in place six years. It had not been subject to any interpretation by a syllabus paragraph, per curiam opinion or even a majority opinion of the Ohio Supreme Court. The trial court, finding Ohio Evidence Rule 803(4) identical to Federal Evidence Rule 803(4) cited and relied upon Federal cases interpreting that rule. Following the trial the Ohio Supreme Court decided *State* v. *Boston*, supra. Following *Boston* this case was decided. *Boston* was modified and the Ohio Supreme Court brought the Ohio interpretation of Ohio Evidence Rule 803(4) into line with the identically worded federal counterpart used by the trial court. Thus, no "retrospective" application of anything occurred.

Finally, the petitioner is actually claiming that the decision in *State* v. *Dever* by the Ohio Supreme Court was an ex post facto law. He couches his claim as "due process" rather than an ex post facto law because this court has eliminated changes in the rules of evidence from the definition of ex post facto laws.

The "change," if any occurred in the Ohio Supreme Court decision, dealt with a rule of evidence. It does not punish previously innocent conduct, increase punishment or deprive defendant of a defense which was previously available. *Collins* v. *Youngblood*, 497 U.S. ____, 110 S.Ct. 2715 (1990). That case reformulated the test for an "ex post facto law" set out in *Calder* v. *Bull*, 3 Dall. 386, 1 L.Ed. 648 (1798), which explicitly prohibited changes to the "legal rules of evidence" to the following:

> "The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the *Ex Post Facto* Clause of Art. 1, § 10."

Significantly, the language dealing with alteration of the rules of evidence was deleted. Footnote 3 in *Collins* v. *Youngblood*, supra, specifically provides:

> "3. The **Beazell** definition omits the reference by Justice Chase in **Calder v. Bull**, 3 Dall. 386, 1 L.Ed. 648 (1798) to alterations in the "legal rules of evidence." See also **Hope v. Utah**, 110 U.S. 574, 590, 4 S.Ct. 202, 210, 28 L.Ed. 262 (1884) (approving procedural changes 'leaving untouched the nature of the crime and the amount or degree of proof essential to conviction'). As cases subsequent to **Calder** make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes. **Thompson v. Missouri**, 171 U.S. 380, 386-387, 18 S.Ct. 922, 924-925, 43 L.Ed. 204 (1898) (rejecting **ex post facto** challenge to retroactive application of statute making admissible handwritten documents as handwriting exemplars); **Hopt, supra**, 110 U.S., at 588-590, 4 S.Ct. at 209-210 (upholding retroactive application of statute making felons competent to testify."

Obviously the deletion of the language concerning "new evidentiary rules" was an intentional deletion by the court. Thus, no ex post facto violation occurred.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully,

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APPENDIX A

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

CASE NO. B875350

THE STATE OF OHIO,

Plaintiff,

vs.

FREDERICK DEVER,

Defendant.

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel Louis Rubenstein on the 12th day of October 1988 for sentence.

The Court informed the defendant as the defendant well knew, after trial by Jury, the defendant had been found guilty of the offenses of Rape 2907.02 R.C., Count 1, and Gross Sexual Imposition 2907.05 R.C., Count 2.

The Court afforded defendant's Counsel an opportunity to speak on behalf of defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's own behalf or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned in Ohio State Penitentiary for a minimum term of Ten (10) years (Five (5) years Actual) to a maximum term of Twenty-five (25) years.

(Count 2 is an allied offense of similar import and no sentence is passed pursuant to R.C. 2941.25.)

Pay costs.

_____

JUDGE

Defendant was notified of the right to appeal as required by Crim. R. 32 (A)(2).